Nos. 18718, 18719

In the United States Court of Appeals for the Ninth Circuit

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

WESTERN COMPRESS COMPANY, APPELLEE

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

FEDERAL COMPRESS AND WAREHOUSE COMPANY, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR APPELLANT

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v.

Federal Compress and Warehouse Company, appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR APPELLANT

STATEMENT OF JURISDICTION

These two actions were brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act [1] to enjoin further violations of the overtime pro-

[1] Act of June 25, 1938, c. 676, 52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.* The Fair Labor Standards Amendments of 1961 (75 Stat. 65) were not in effect at the time this litigation was commenced.

visions of Section 7 of the Act (R. 1–6). The actions were consolidated for hearing and submitted on cross-motions for summary judgment, based on a record consisting of stipulations and a deposition (R. 44, 46, 48). The court below granted appellees' motions (R. 50–57) and entered judgments for appellees accordingly on January 11, 1963 (R. 58–61). Notices of appeal were filed on March 8, 1963 (R. 62, 64), and a motion to consolidate these actions for purposes of appeal was granted by this Court, which has jurisdiction to review the judgments below under 28 U.S.C 1291 and 1294(1).

STATEMENT OF FACTS

Appellees operate plants in which they engage in storing, warehousing, compressing, handling and shipping cotton (R. 12, 27). They acknowledge that virtually all of the cotton which they store or compress is shipped outside the state (R. 20, 35), and admit that their employees are not being paid in accordance with the overtime provisions of the Act (R. 24, 34). However, appellees contend, and were upheld by the district court, that all of their employees, regardless of the duties they perform, are exempt from the overtime requirements by virtue of Section 7(c) of the Act, which provides that "[i]n the case of an employer engaged * * * in the ginning and compressing of cotton", the overtime requirments of the Act "shall not apply to his employees in any place of employ-

ment where he is so engaged."[2] The sole issue on this appeal is whether this exemption for "compressing" extends to the warehouse storing of cotton in appellees' plants.[3]

According to the parties' stipulations cotton is received by appellees in bales from various cotton gins in the area. A portion of such cotton (approximately

[2] The full text of Section 7(c) reads:

"In the case of an employer engaged in the first processing of milk, buttermilk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar-beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into sirup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Secretary), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged." [29 U.S.C. 207(c)]

[3] It was stipulated (R. 25, 35) that any of appellees' employees engaged in storing activities may qualify for the 14 week overtime exemption which Section 7(b)(3) provides for industries found by the Wage and Hour Administrator "to be of a seasonal nature" since the Administrator has found the "warehousing of cotton" to be a seasonal industry. (Wage Hour Manual (B.N.A.) 91:1555.) This exemption, of course, does not apply to overtime workweeks in excess of 14 in any one year.

15% in the case of Western and approximately 50% in the case of Federal [4]), designated as "in transit" or "C.I.T." cotton, is compressed and shipped immediately upon receipt, or, depending upon the work load, within an average period of one to four days (R. 17, 30, 77). No warehouse receipts are issued on such cotton, and no storage fees are charged (R. 17, 30). The handling of "in transit" or "C.I.T." cotton is concededly an exempt activity under Section 7(c) and, as indicated *infra,* pp. 22–23, any temporary storing which such cotton undergoes is considered as simply incidental to its compressing.

However, it is the Secretary's position that activities relating to the storage of the remaining 85% of the cotton handled by Western and 50% of the cotton handled by Federal are not within the exemption provided by Section 7(c). Such cotton is placed in warehouse storage upon arrival at appellees' facilities. Warehouse receipts are issued and storage charges are imposed in accordance with appellees' published tariffs. (R. 14, 20, 28, 32.) Such cotton remains in storage for varying periods until such time as the owner may issue a shipping and pressing order. During a one year test period, over a third of the cotton warehoused by appellees had been in storage for over four months (R. 19, 36, 38, 41). Some 10% of this cotton is already compressed to standard density when it reaches appellees' warehouses, and one-half of this amount is subsequently further compressed by defendants to high

[4] These percentages are derived from the figures stipulated to by the parties and found at R. 19, 36, 38, 40.

density (R. 53). Approximately five percent of the cotton handled by defendants leaves their warehouses after storage without being compressed at all by them (R. 53).

Of the four plants involved in this litigation (three belonging to Federal and one to Western), by far the greater portion of the premises of each is devoted to warehouse storage of cotton rather than to compressing. Federal's plants consist of from six to eight warehouses each, plus an office building, a garage, a power house, and some residences; only one warehouse in each plant is utilized (and only in part) for compressing, while the others are devoted entirely to storing (R. 27–29). Western's plant consists of one office building and a warehouse building which is divided into twelve compartments. Only one compartment in the latter building is used for compressing; the others are solely for storing (R. 13).

The employees who are the subject of this litigation are engaged at defendants' facilities in such activities as receiving, unloading, sampling, tagging and weighing cotton, moving cotton into and out of storage compartments, operating the various presses, and moving cotton to the shipping docks. Others are engaged in the office buildings in clerical and typing work. While they have specific job classifications, employees, other than clerical and typing, may be assigned to work outside their classifications (R. 22, 23, 33). Thus, it was stipulated that when the compress machinery is in operation the press crews work exclusively in compressing activities (R. 22, 33);

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while during the active cotton receiving season employees normally assigned to compressing and related activities are assigned as needed to receiving cotton for storage and moving cotton to the storage compartments (R. 23, 33).

In his deposition testimony Western's President, Mr. Dellinger, stated that the purpose of compressing is to effect savings in freight rates (R. 76). He also pointed out the different purposes for which cotton is stored: to await favorable market conditions, to await the arrival of other cotton to fill out a shipment, or to await a buyer (R. 80–81, 88–89).[5] While Mr. Dellinger asserted that he considered Western to be in the compressing business, not the storage business (R. 81, 89, 99), he admitted that Western had obtained a license to operate a warehouse under Arizona law (R. 87), and that his company stored cotton for hire, and he acknowledged that "to that extent" Western was in the storage business (R. 99–100, 89). It was stipulated that Western receives approximately 40% of its gross income from its storage business (R. 20), and Federal 33% (R. 32).

DECISION BELOW

The court below concluded that the Section 7(c) exemption applies "to all of the employees on the

[5] According to Mr. Dellinger much of the cotton stored is "loan cotton" upon which the Commodity Credit Corporation has guaranteed the farmer a minimum price by extending him a non-recourse loan, allowing the farmer to repossess the cotton if market conditions warrant such a course (R. 79–80). If the market declines the cotton will be stored for "some time" (R. 89. See also R. 15, 30).

premises" of appellees (R. 54), regardless of whether the employees engage in the operation specifically named therein as exempt. In so holding the court considered as factually distinguishable cases holding that Section 7(c) "does not exempt industries from the overtime provisions of the Act, but only the specific processes therein mentioned", and that "[t]he term 'place of employment' as used in Section 7(c) of the Fair Labor Standards Act means those portions of the plant devoted by the employer to the [specified] operations". *Fleming* v. *Swift & Co.*, 41 F. Supp. 825, 831 (N.D. Ill., 1941), affirmed 131 F. 2d 249 (C.A. 7), and *Shain* v. *Armour,* 50 F. Supp. 907, 911 (W.D.Ky., 1943).

SPECIFICATION OF ERRORS

The court below erred:

(1) In concluding that the exemption in Section 7(c) extends to all employees on the premises without regard to the particular activities performed by them or to the portion of the premises in which they work.

(2) In granting appellees' motions for summary judgment and denying appellant's motion for summary judgment.

ARGUMENT

Appellees' employees who are engaged in whole or in part in the storing of cotton are not within the exemption for "compressing" of cotton provided by section 7(c).

Section 7(c), so far as relevant here, provides that

"[i]n the case of an employer engaged * * * in the ginning and compressing of cotton * * * [the overtime provisions of the Act] shall not apply to his employees in any place of employment where he is so engaged." The section does not refer to the storing of cotton, but appellees contend that the exemption is applicable to the storing as well as the compressing activities of their employees, and the court below agreed.

It is settled that a claim to an exemption from this Act is a matter of affirmative defense and that the employer must show plainly and unmistakably its applicability. *Arnold* v. *Ben Kanowsky, Inc.,* 361 U.S. 388; *Consolidated Timber Co.* v. *Womack,* 132 F. 2d 101, 106 (C.A. 9). In attempting to meet this burden appellees rely on two basic propositions: (1) that if an employer is engaged in an activity specified in Section 7(c) as exempt—in this case "compressing"—the exemption extends to all of his employees regardless of their particular activities; and (2) that in any event the storing of cotton is simply a necessary incident to compressing.

As we demonstrate below, the first proposition, which appears to be the one upon which the district court based its decision, is directly contrary to the decided cases, which establish that Section 7(c) applies only to employees engaged in activities enumerated in the exemptive language or in activities necessary thereto, and that such work must be performed in those portions of the premises devoted to such enumer-

ated activities. The second proposition (which the district court regarded as "extremely persuasive" (R. 55–56)) is incompatible, we submit, with the text of the statute, the legislative history, the longstanding administrative interpretation acquiesced in by Congress, and the established rules of statutory construction.

A. The Section 7(c) exemption applies only to those employees engaged exclusively in an activity specified in Section 7(c) or in work which is a necessary incident of such an activity, performed in a portion of the premises devoted to that activity.

1. ***Employees whose duties relate in whole or in part to activity other than compressing are not within the Section 7(c) exemption for compressing.***

Contrary to the district court's interpretation of Section 7(c), the courts have consistently adhered to the view that "the application of this exemption is determined by the nature of the duties performed by the employees" (*Walling* v. *Bridgeman-Russell,* 2 Wage Hour Cases 785, 790, 6 Labor Cases ¶61,422 (D. Minn., 1942, not officially reported), and that "to come within the exemption of this provision it is necessary that the work of the employees be confined to [the specified] operations" (*Domenico* v. *Mitchell,* 232 F. 2d 112, 114 (C.A. 10)). Accord: *Fleming* v. *Swift & Co.,* 41 F. Supp. 825, 831 (N.D. Ill., 1941), affirmed 131 F. 2d 249 (C.A. 7); *Shain* v. *Armour,* 50 F. Supp. 907, 911 (W.D. Ky., 1943); *Walling* v. *DeSoto Creamery & Produce Co.,* 51 F. Supp. 938, 941 (D. Minn., 1943); *Hammonds* v. *J. W. Broom & Sons,* 195 F. Supp. 504, 509 (W.D.N.C., 1961).

The reason for this construction of Section 7(c) was aptly set forth in *Armour & Co., supra,* where, in rejecting the employer's contention that this exemption applied to all of its employees because an activity specified as exempt therein represented the major (though not the entire) portion of the work performed in the place of employment, the court stated:

> This contention presents a strict and technical construction of the words used in Section 7(c) of the Act, which in the opinion of this Court is entirely inconsistent with the fundamental purpose of the Act and with the common sense interpretation which would have to be employed in dealing with any company engaged in several various kinds of activities. [50 F. Supp. at 910] [6]

Application of the foregoing view of Section 7(c)'s scope is well illustrated by the Tenth Circuit's *Domenico* decision, *supra,* where the employer's handling, processing, packing and loading of fresh vegetables

[6] The same principle has been applied to the other so-called "employer" exemptions in the Act. *Walling* v. *Connecticut Co.*, 154 F. 2d 552 (C.A. 2), involved employees engaged in the production of electric power for use by their employer in his exempt business as an electric railway carrier. Though Section 13(a)(9) exempts "any employee" of such an employer, it was held not to apply to those employees because the power they produced was used in operating nonexempt instrumentalities of interstate commerce as well as the exempt electric railway. See also *Northwest Airlines* v. *Jackson*, 185 F. 2d 74 (C.A. 8), certiorari denied 342 U.S. 812. There, the exemption in Section 13(b)(3) for "any employee of a carrier by air" was held not to apply to employees of such a carrier whose duties related to modification of planes for the Government.

received from local sources constituted "first processing"—which, like cotton compressing, is an exempt activity under Section 7(c). However, the employer's packing and unloading of "mountain grown" vegetables in the same areas of its establishment was held not to be an exempt activity, since such vegetables had already been "first processed" elsewhere. Accordingly, the court concluded that "since Domenico's employees work on both first processed fruits and vegetables and on mountain grown vegetables, he is entitled * * * to claim no exemption under Section 7(c)" (232 F. 2d at 116).[7]

Similarly, in *Shain* v. *Armour & Co.*, 50 F. Supp. 907 (W.D. Ky., 1943), it was held that operations in defendant's creamery department in testing, cooling, cutting and packaging butter churned elsewhere and brought into the plant in tubs were not within the exemption of Section 7(c), although the same opera-

[7] Having applied the principle that the Section 7(c) exemption did not apply to activities which are not specified in the exempting provision, the court's denial of the exemption for employees engaging in both activities follows from the well established rule that the performance of both exempt and nonexempt activities by an employee in the same workweek results in the loss of the exemption. See, *e.g.*, *Mitchell* v. *Hunt*, 263 F. 2d 913 (C.A. 5); *Tobin* v. *Blue Channel Corporation*, 198 F. 2d 245, 248 (C.A. 4); *Wabash Radio Corporation* v. *Walling*, 162 F. 2d 391, 394 (C.A. 6); *Anderson* v. *Manhattan Lighterage Corp.*, 148 F. 2d 971 (C.A. 2), certiorari denied 326 U.S. 722; *North Shore Corporation* v. *Barnett*, 143 F. 2d 172, 175 (C.A. 5); *McComb* v. *Puerto Rico Tobacco Marketing Co-op Ass'n.*, 80 F. Supp. 953, 957 (D.P.R. 1948), affirmed 181 F. 2d 697 (C.A. 1).

tions, when performed on butter churned in the plant, would be an exempt activity under Section 7(c) as part of the first processing of cream into dairy products. The court pointed out that Section 7(c) "does not exempt industries as a whole from the overtime provisions of the Act, but only those processes therein mentioned" (50 F. Supp. at 911, 913).[8]

To the same effect are *Walling* v. *Bridgeman-Russell Co.,* 2 Wage Hour Cases 785, 6 Labor Cases ¶ 61,422 (D. Minn., 1942, not officially reported) (similar facts and same holding as related to creamery department in *Shain* v. *Armour, supra*); *Fleming* v. *Swift,* 41 F. Supp. 825 (N.D. Ill., 1941), affirmed on other grounds 131 F. 2d 249 (C.A. 7) (the court concluding that Section 7(c) places "a functional limitation on the classes of employees for whom an exemption from the overtime provisions may be claimed" (41 F. Supp. at 831) and therefore ruling that only those employees of certain processing departments who were engaged exclusively in occupations which are a necessary part of the processing operations specified in Section 7(c) would be within the exemption); *Walling* v. *DeSoto Creamery & Produce Co.,* 51 F. Supp. 938, 943 (D. Minn., 1943) (holding that employees in defendant's poultry proc-

[8] With respect to Armour's poultry department, the court similarly held that the handling, slaughtering, and dressing of poultry are within the Section 7(c) exemption, but that work performed on poultry in this department after it is dressed is not. Accordingly, it was concluded that since most poultry department employees combined these exempt and nonexempt activities, they would not be exempt. (50 F. Supp. at 911–912)

essing plant engaged in grading, packing and loading, and employees handling nonexempt eggs were not exempt "because said Section 7(c) does not provide an industry exemption but only an exemption for those employees engaged in the specified operations"—in this case, handling, slaughtering and dressing poultry); *Hammonds* v. *J. W. Broom & Sons,* 195 F. Supp. 504, 509 (W.D. N.C., 1961) (where the court, while concluding that defendant's business "comprised one establishment" nonetheless held the Section 7(c) exemption inapplicable to an employee who performed nonexempt milling work as well as exempt cotton ginning work.).

See also *Libby, McNeill & Libby* v. *Mitchell,* 256 F. 2d 832 (C.A. 5), where the court, in contrasting the respective reaches of the Section 7(c) and the Section 7(b)(3) overtime exemptions, considered "of extreme importance" the fact that "under Section 7(c) the exemption applies only to those *employees* engaged in [an enumerated activity]—whereas Section 7(b)(3), on the other hand, extends the exemption to "any employee * * * if such employee is * * * employed in * * * an industry" (256 F. 2d at 834; emphasis, the court's).

The construction placed upon Section 7(c) by the foregoing decisions has never been contradicted by other judicial authority. That such construction must be considered to accord with the Congressional intent seems evident from the fact that when Congress in 1961 extensively revised the Fair Labor Standards Act it not only made no change in the language of

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Section 7(c), but the Committee reports of both Houses, in defining the scope of this exemption, applied precisely the same construction: "Under Section 7(c), exemption depends upon *the employee's engagement in particular work* in a place of employment where his employer is so engaged in the named operation" (Sen. Rep. No. 145, 87th Cong., 1st Sess., pp. 36–37; H. Rep. No. 75, 87th Cong., 1st Sess., p. 25; emphasis added).

Of the cases cited to support the above construction of Section 7(c) the opinion of the court below considered only two—the *Swift* and *Armour* decisions, both of which the court apparently felt were distinguishable from the instant situation as not involving the intermingled performance of exempt and nonexempt work. In the instant case, the court stated, there is no way to tell from the manner in which an employee handles a bale of cotton or the place he stores it whether it is intended for immediate compressing or prolonged storage, and, moreover, the employer might not know until after the event which bales had been handled for such purpose (R. 54–55). It is clear, however, that both the *Swift* and *Armour* decisions, as well as other decisions cited herein, *supra,* pp. 9–13, did in fact involve the intermingled handling of exempt and nonexempt goods in a manner fully comparable to that involved here.[9]

[9] In *Armour* the court expressly pointed out that employees of the creamery department performed duties relating to both butter churned in the plant and butter brought in from outside and concluded that "such employees as devote part of their time during the workweek to duties other than the first processing of cream into butter are not exempt under the

Moreover, not only is there no warrant for concluding that difficulty of distinguishing between exempt and nonexempt work serves to preclude application of the general rule established for such cases (see fn. 7, *supra,* p. 11), but the fact is that the record in this case reveals no such difficulty as is suggested by the court below in distinguishing between exempt and nonexempt activity. To the contrary, it was stipulated between the parties that "in transit" or "C.I.T." cotton, which is to be immediately compressed and which is generally shipped out within one to four days, arrives at appellees' plants preceded by pressing and shipping orders from the merchants who have already contracted for its sale and delivery (R. 17–18, 30). Since all other cotton arrives at the

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Act" (50 F. Supp. at 911). With respect to poultry department employees the court likewise indicated that exempt and nonexempt work was intermingled, stating that "in most instances employees engaged in handling, slaughtering, and dressing operations combin[ed] exempt and nonexempt operations" so that "few, if any, would be exempt to any extent" (50 F. Supp. at 911–912). Similarly, it is clear that the court in *Swift* was dealing with intermingled activities since its conclusions of law provide that Section 7(c) exemption applies only to one who during any workweek "is working exclusively in an occupation which is a necessary part of the handling, slaughtering or dressing of livestock" (Concl. 8, 41 F. Supp. at 831), and, further, that "an employer may not claim an exemption for any employee under Section 7(c) if the employee during any part of the workweek for which the exemption is claimed does any work which does not fall within the scope of the exemption" (Concl. 11, 41 F. Supp. at 832. See also, in particular, the *Domenico* decision (232 F. 2d 112)) which the district court did not mention, but where, as we have discussed above, pp. 10–11, employees were quite plainly engaged in the intermingled handling of exempt and nonexempt vegetables.

plants with warehouse receipts issued therefor, and is placed in storage until such time as pressing and shipping orders may be received, there would seem to exist a ready distinction between the non-exempt handling of storage cotton on the one hand, and the exempt handling and compressing of "in transit" cotton and compressing of storage cotton on the other. The fact that appellees find it convenient or preferable to at times engage their employees interchangeably in exempt and non-exempt activity—just as, *e.g.,* the *Domenico* employees were engaged in handling both exempt and nonexempt vegetables and the *Armour* employees were engaged in working on both exempt and nonexempt butter and in performing both exempt and nonexempt poultry operations—establishes that the same result should be reached here as was reached in those and other cases cited above, pp. 9–13.

2. Employees who perform work in areas not devoted to compressing activities are not within the Section 7(c) exemption for compressing.

We submit further that the court's extension of the exemption "to all of the employees on the premises" (R. 54) is precluded by the fact that Section 7(c) is, on its face, limited to employees working in a "place of employment where he [the employer] is so engaged," *i.e.,* where he is engaged in a specified activity, in this case "compressing." Bearing in mind that each of Federal's premises consists of an office building and six to eight warehouse buildings, only one of which (and that only in part) is used for compressing, and that Western's premises consists of an office building and a warehouse, only one compart-

ment of which is used for compressing (R. 13, 27–29), it seems clear that the entire premises of each appellee cannot reasonably be deemed the "place" where each is engaged in "compressing". Such a view would leave no role at all for the restrictive phrase "where he [*i.e.,* the employer] is so engaged". To give this phrase meaning and effect, it must be read to limit the exemption to employees working "in" the particular "place" in which the employer is actually engaged in compressing.

And the courts have so held. In *Fleming* v. *Swift,* 41 F. Supp. 825 (N.D. Ill., 1941), affirmed 131 F. 2d 249 (C.A. 7), the employer was engaged in acquiring and slaughtering livestock and in the processing, manufacturing, and distributing of meat, meat products, and by-products. In applying Section 7(c) to this establishment the court carved out for exemption only those departments of the plant in which the operations specified in the section ("handling", "slaughtering" and "dressing") were performed, holding that the portions of the plant devoted to those operations constituted the "place of employment", and that employees in other, even though related, departments (such as those devoted to meat-curing) were not within the scope of the exemption. (As already pointed out, *supra* p. 12, the court also held that the exemption applied only to the employees in such departments who were engaged solely in the specified work.) Similarly in *Walling* v. *De-Soto Creamery & Produce Co.,* 51 F. Supp. 938, 943 (D. Minn., 1943), one basis for the court's holding that employees of a poultry processing plant engaged

in grading, packing and loading were not within Section 7(c)'s exemption for "handling, slaughtering and dressing" of poultry, was that "grading, packing and loading are not performed in any place of employment where he [the employer] is so engaged; to wit, the killing and picking room". See also *Walling* v. *Bridgeman-Russell Co.,* 2 Wage Hour Cases 785, 6 Labor Cases ¶ 61,422 (D. Minn., 1942, not officially reported), where the court pointed out, in connection with a claim for Section 7(c)'s "first processing" exemption:

> "The term 'place of employment' * * * *means those portions of an establishment devoted by the employer to 'first processing' operations.* The * * * exemption is applicable to any employees who perform exclusively the operations described in this section, and any employees who though not engaged in 'first processing' operations, are engaged exclusively in occupations which are a necessary part thereof and *perform such duties in those portions of the premises.* (2 Wage Hour Cases at 790, emphasis supplied).

Since appellees maintain separate portions of their facilities, even separate buildings, for storage and compressing purposes, the situation here is essentially no different from that involved in the *Swift* case where the exemption was held limited to those particular portions of the plant devoted to "slaughtering" and "dressing" operations, or in the *DeSoto Creamery* case where the poultry dressing rooms, though closely related in terms of sequence of operation, were held to be a separate "place of employ-

ment'' from the cooling and packing rooms. We submit, therefore, that it is incompatible with the terms of the exemptive provision to extend it to employees working in appellees' separate office buildings where its general clerical work is performed, or in areas devoted solely to warehousing.

B. The Warehouse Storing Activities in Appellees' Establishments Are Not "Compressing" Within the Meaning of Section 7(c).

We turn now to appellees' contention that regardless of the above discussed limitations on the scope of Section 7(c), the relationship between compressing and storing is such that the term ''compressing'' is to be regarded as including those storing activities carried on by the employer.

We submit that this contention is not tenable in the light of the legislative history, which shows a clear Congressional intent to exclude storing from the scope of the exemption. In accordance with that legislative history, it has been the expressed administrative position almost from the beginning that storing is not exempt as an incident of ''compressing''—a consistent, long-standing interpretation which Congress has never repudiated and has in effect ratified. In these circumstances, we submit, the appellees have failed to meet the burden laid upon them by the established principle of statutory construction which requires that exemptions from this Act be narrowly construed and applied only to persons plainly and unmistakably within their scope.

It is clear from the legislative history that the question of extending the exemption of Section 7(c) to storing was the subject of explicit Congressional

attention, and that storing was deliberately excluded from its scope. In an earlier version of the bill, recommended by the House Committee on Labor, the corresponding provision extended this overtime exemption to both "compressing and storing". H. Rep. No. 1452, 75th Cong., 1st Sess., page 3. In addition, an amendment was proposed during the debates in the House, entirely exempting, among others, "any person employed in connection with the ginning, compressing and storing of cotton" (82 Cong. Rec. 1776). A similar amendment was also proposed in the Senate exempting "cotton compresses, cotton warehouses, cotton ginning and baling" (81 Cong. Rec. 7887). Congress, however, rejected all of these proposals, and instead selected the specific operations of "ginning" and "compressing" for overtime exemption.

In contrast, in Section 13(a)(10) which gives a complete exemption for specified activities performed within a limited "area of production", Congress expressly specified "storing" as well as "compressing." [10]

This difference between the wording of the Section 7(c) exemption and that of Section 13(a)(10) serves further to demonstrate the inapplicability of Section 7(c) to the storing of cotton, for it is settled that the

[10] Section 13(a)(10) reads in full as follows:

"Section 13(a) The provisions of sections 6 and 7 shall not apply with respect to—

* * * * *

"(10) any individual employed within the area of production (as defined by the Secretary), engaged in handling, packing, storing, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products;".

Act's several exemptions relating to agriculture must be read together as a unified "congressional scheme" (*Maneja* v. *Waialua Agricultural Co.,* 349 U.S. 254, 268), and that "all the sections relating to exemptions are *in pari materia* and must be construed together to form a consistent whole, if possible" (*Bowie* v. *Gonzalez,* 117 F. 2d 11, 17 (C.A. 1)). Thus in *Maneja,* the Supreme Court reasoned that the specific inclusion of sugar milling in Section 7(c), as well as its omission from mention in Section 13(a)(10), "marks the outer limits of Congressional concession to this type of processing" and therefore "requires us to hold that sugar milling is outside the agriculture exemption" of Section 13(a)(6). 349 U.S. at 268–269.

The Supreme Court's reasoning in *Maneja* accords with that applied in the earlier Eighth Circuit decision in *Stratton* v. *Farmers Produce Co.,* 134 F. 2d 825, where the question was whether the processing of poultry could be impliedly read into Section 13(a)(10). It was concluded by the court that "[t]he enumeration in Section 7(c) of [the handling and processing of poultry] as a separate classification from 'the first processing * * * of any agricultural or horticultural commodity' * * * would seem quite definitely to indicate that the handling or packing of poultry * * * was not intended to be included in the term 'handling, packing, * * * of agricultural or horticultural commodities for market' under the exemption of Section 13(a)(10)" (134 F. 2d at 827).

This same approach was elaborated in *Bowie* v. *Gonzalez,* 117 F. 2d 11 (C.A. 1), which involved the question of whether the processing of sugar cane was

exempt under Section 13(a)(10). The First Circuit noted that while sugar cane processing was specifically mentioned in Section 7(c) it was not mentioned in Section 13(a)(10). It compared this situation with that of "cotton ginning" which was mentioned specifically in both, and reasoned that the presence of a specified activity in one provision and its absence in the other clearly indicated an intention to limit the exemption to the former (117 F. 2d at 19). It concluded that it "cannot be important that sugar processing is similar to those operations included in Section 13(a)(10), as Section 7(c) is ample evidence of the fact that Congress had sugar processing in mind and knew how to include it when it so desired" (*ibid.*). So in the instant case Congress' inclusion of "storing" in Section 13(a)(10) is "ample evidence" of the fact that Congress had storing in mind and "knew how to include it when it so desired."

In the light of this legislative history, the Wage-Hour Administrator ruled at the outset that "the storing of cotton, either before or after compressing is not * * * included in the term 'ginning and compressing cotton' in Section 7(c)." Interpretative Bulletin No. 14, Section 16, originally issued August 21, 1938, reissued in December 1940 (B.N.A. Wage and Hour Manual, 1940 ed., at p. 162, and all subsequent editions). The Administrator has consistently applied this interpretation in his enforcement of the Act throughout the years. In 1958 he clarified further that storing would not be exempt as "necessary incidents" to compressing, except for "transit storage or similar temporary storage of cotton awaiting compressing,

or awaiting loading out after compressing" (23 Fed. Reg. 8119, Oct. 22, 1958, 29 C.F.R. 780.953).

The reasonableness of this administrative interpretation is particularly evident from the facts of the instant case, which demonstrate clearly the functional and economic distinctiveness and separateness of the warehousing and compressing activities carried on by the appellees.

Thus appellees are licensed to engage in the business of warehousing as operators of bonded storage facilities (R. 14, 35). Their published tariffs list separate fees for storage and for compressing (R. 26, 43). They distinguish between cotton delivered to them for storage and cotton "in transit" which is delivered for immediate compressing (but which may require temporary storage while awaiting the compressing operation, or while awaiting shipping out after compressing), by issuing warehouse receipts only in the case of the former (R. 17, 30). The storage cotton is kept for extensive periods of time, well over one-third of it being stored for more than four months (R. 19, 36, 38, 41). Of necessity, it is stored in areas separate from that where the compress machinery is located (R. 13, 27–29). According to appellees' figures, 40% of Western's gross income and 33% of Federal's is received for storage as distinguished from compressing (R. 20, 32). Admittedly, the two services rendered by appellees to their customers serve different needs. The customer engages the appellees' compressing services in order to effect savings in transportation costs (R. 76). He may, in addition, engage the appellees' warehousing services,

when and to the extent that they are needed to meet his merchandising and shipping problems; *i.e.,* if he wishes to wait for favorable price conditions, or for the accumulation of a sufficient stock of like quantity to make up a particular shipment (R. 88, 89). These are obviously distinct services; and each is available to the customer separately as may be needed by him. About 50% of the cotton handled by Federal, and 15% of the cotton handled by Western, is compressed without warehousing (R. 19, 36, 38, 40); and, while warehoused cotton is normally compressed before leaving, approximately five percent of such cotton is not compressed by the appellees (R. 53).

It should, moreover, be pointed out—and this consideration further attests to the soundness of the administrative position—that an interpretation which would relieve warehouses with compress equipment of all obligation to pay overtime wages in accordance with the Act, would accord such warehouses a distinct advantage as against those warehouses, apparently of generally smaller size,[11] which do not possess such equipment—a result which Congress cannot be readily assumed to have intended. As was stated in *Walling* v. *Connecticut Co.,* 62 F.Supp., 733, 735 (D. Conn.,

[11] A standard text on the cotton industry characterizes the two types of warehouses as follows:

"There are two types of warehouses in the Cotton Belt. One of these types is the small outlying local warehouse. Such warehouses are without compresses and are about 1,150 in number. The other type is the large warehouse having much storage space, ample shipping connections, and equipped with compresses. There are about 305 of these establishments." (Harry Bates Brown, *Cotton*, McGraw-Hill Book Company, New York, 1958, p. 442.)

1945), affirmed 154 F. 2d 552 (C.A. 2), in connection with a claim to another exemption under this Act:

> If the employer regularly and substantially engages in an otherwise nonexempt business other than the one for which the exemption was designed, however, strict construction of the exemption requires that it be not extended to that other business merely because the principal business of the employer is exempted. To do so would hardly be fair to those who must compete in that other business as their major activity.

We submit, therefore, that the consistent administrative position is right, and that it is at the least entitled to great weight as part of "a body of experience and informed judgment" in a class with the interpretive determinations of this and many other administrative authorities which have been "given considerable and in some cases decisive weight", *Skidmore* v. *Swift,* 323 U.S. 134, 140—all the more so because it represents the earliest "contemporaneous construction of [the] statute by the [authority] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently while they are yet untried and new". *United States* v. *American Trucking Associations,* 310 U.S. 534, 539.

Moreover, it is evident from subsequent legislative developments that Congress has acquiesced in and in effect ratified the interpretation of the Administrator. During the hearings which preceded the enactment of the 1949 Amendments, at which time the Congress undertook a comprehensive consideration of the provisions of the Act and the interpreta-

tions which they had been given, the Administrator's position regarding the scope of the "compressing" exemption in Section 7(c) was called to the attention of the Labor Committees of both Houses by a spokesman for the National Cotton Compress and Warehouse Association (Hearings before the House Committee on Education and Labor on H.R. 2033, 81st Cong., 1st Sess., p. 916; Hearing before a Subcommittee of the Senate Committee on Labor and Public Welfare on S. 58, *et al.,* 81st Cong., 1st Sess., p. 675). The spokesman, John H. Todd, protested to these Congressional committees that:

> Each successive Administrator of the Fair Labor Standards Act has interpreted and applied the exemptions contained in Section 7(c) and 13(a)(6) and 13(a)(10) for the ginning, compressing, and warehousing of cotton, and has interpreted the phrase 'area of production' of agricultural and horticultural commodities, as used in the Section 7 and Section 13 (a)(10) exemptions, in a manner calculated to restrict the application of those exemptions to the fewest possible number of persons.
>
> For example, whereas the section 7(c) exemption from overtime in the ginning and compressing of cotton says that the maximum hours and overtime provisions shall not apply to the employees of an employer engaged in the ginning or compressing of cotton at any place of employment where he is so engaged, the Administrators have consistently interpreted that exemption as applying *only to those employees in cotton gins and in compress-warehouse plants actually working on or at the*

> *machines which gin or compress the cotton.* Those Administrators have maintained that the exemption is not applicable to persons performing the interrelated functions essential to the operation of ginning and compressing plants. (Emphasis added.)[12]

On the basis of these hearings, Congress re-enacted Section 7(c) with an amendment extending the scope of its exemption to "the first processing of buttermilk" (63 Stat. 913), but not changing the language which was the subject of the protested administrative interpretation. This negative response to the protest of the industry thus brought into play the principle frequently applied by the Supreme Court and succinctly stated by it in *Brewster* v. *Gage,* 280 U.S. 327, 337, thus:

> The substantial reenactment in later Acts of the provision theretofore construed by the department is persuasive evidence of legislative approval of the regulation. National Lead Co. v. United States, 252 U.S. 140, 146; United States v. Cerecedo Hermanos y Compania, 209

[12] The spokesman for the Association did, to some extent, misstate the administrative position which has always recognized that activities truly incidental to the exempt operation are within the exemption. Thus, in the Administrator's Release R–1892, dated January 1943 and published in 1944–1945 Wage Hour Manual at page 574, it was explained that Section 7(c) was generally applicable to employees "whose activities are a necessary incident to the described operations, and who work solely in those portions of the premises devoted by their employer to the described operations." With particular reference to "compressing" the earlier Interpretative Bulletin No. 14 had specifically cited "the receiving and weighing of the lint, both before and after compressing" as an exempt part of the compressing operation.

U.S. 337, 339; United States v. G. Falk & Brother, 204 U.S. 143, 152.

To the same effect, see *Helvering* v. *Reynolds Co.,* 306 U.S. 110, 114–115, and *National Labor Relations Board* v. *Gullett Gin Co.,* 340 U.S. 361, 366.

Moreover, not only did Congress reenact this section without any change to meet the opposition to the administrative position here in question, but it also expressly declared, in Section 16(c) of the Amendments, that existing administrative interpretations, not inconsistent with the Amendments, "shall remain in effect."[13] Section 16(c) thus provides a "unique imprimatur" to pre-1949 administrative interpretations (*Libby, McNeill & Libby* v. *Mitchell,* 256 F. 2d 832, 837 (C.A. 5)), and has been relied upon by the Supreme Court in upholding a number of such interpretations of the Act: *Alstate Construction Co.* v. *Durkin,* 345 U.S. 13, 16–17; *Maneja* v. *Waialua Agriculture Co.,* 349 U.S. 254, 270; *Steiner* v. *Mitchell,* 350 U.S. 247, 255; *Mitchell* v. *Kentucky Finance Co.,* 359

[13] Section 16(c) of the Fair Labor Standards Amendments of 1949, 63 Stat. 920, 29 U.S.C. 208 note (1958 ed.), provides:

"Any order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, and any agreement entered into by the Administrator or the Secretary, in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect as an order, regulation, interpretation, or agreement of the Administrator or the Secretary, as the case may be, pursuant to this Act, except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act, or may from time to time be amended, modified, or rescinded by the Administrator or the Secretary, as the case may be, in accordance with the provisions of this Act."

U.S. 290, 292. The interpretations outstanding in the first two of these cases were sustained even though they represented changes in an earlier position. The interpretation in issue here, however, not only represents the earliest contemporaneous construction of this provision, but it has been consistently adhered to. Since it is plainly not inconsistent with the 1949 Amendment, the *Alstate* and *Waialua* rulings apply *a fortiori* here.

If there remained any substantial doubt as to the applicability of Section 7(c) to appellees' storage activities, the well settled principle of strict construction of the exemptions from this Act would plainly require resolution of that doubt against the claim of exemption. This Court was one of the first to caution "that the Act is remedial and that persons claiming to come within exemptions therein must bring themselves within both the letter and spirit of the exceptions, which are subject to a strict construction." *Consolidated Timber Co.* v. *Womack,* 132 F. 2d 101, 106. The Supreme Court has added that the claimants must do so "plainly and unmistakably". *Arnold* v. *Ben Kanowsky,* 361 U.S. 388, 392; *Phillips Co.* v. *Walling,* 324 U.S. 490, 493.

We submit that it is far from plain and unmistakable that the appellees have brought their storage operations within the exemption for "compressing". It is, on the contrary, plain from the text of the exemption, the decided cases, and the legislative history—let alone the consistent and undisturbed administrative interpretation since the enactment of the statute—that there is no exemption in Section 7(c)

for warehousing, and that storage operations are exempt only if they occur in the period immediately preceding or following compressing and are necessary to permit the cotton to take its turn at the compress or to await transportation out of the plant.

CONCLUSION

For the foregoing reasons, we ask this Court to reverse the decision below, and to remand the cause with instructions to grant plaintiff's motion for summary judgment.

Respectfully submitted.

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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